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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Commodity Futures Trading Commission,

Plaintiff,

V.

Abbas A. Shah and Linuxor Asset Management, LLC

Defendants.

05 CIV 8091 LAK

ECF CASE

Judge Kaplan

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed Memorandum of Law and Declaration of Abbas A. Shah, dated October 20, 2006, and upon all prior pleadings and proceedings had herein, Defendants, Abbas A. Shah and Linuxor Asset Management, LLC, will move this Court, in Courtroom 12D at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York, for an Order granting an extension of time to depose a third-party witness and granting a stay of all deadlines and proceedings herein, together with such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that answering papers are demanded ten days after service, pursuant to Local Civil Rule § 6.1(b).

Dated: New York, New York
October 20, 2006

HARTMAN & CRAVEN LLP
Attorneys for Defendants

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**MOTION FOR PERMISSION TO CONDUCT
THE DEPOSITION OF A NON-PARTY WITNESS
AND FOR A STAY OF ALL PROCEEDINGS THEREAFTER**

This motion is respectfully submitted on behalf of the defendants, **ABBAS A. SHAH and LINUXOR ASSET MANAGEMENT, LLC** (together, “Defendants”), seeking an extension of time to conduct the deposition of Phillip Egger, a non-party witness, and a stay of all proceedings in this action pending the resolution of certain related arbitration proceedings under the National Futures Association (“NFA”).

David Acevedo, counsel for plaintiff, **COMMODITY FUTURES TRADING COMMISSION** (“Plaintiff”), has indicated that he does not oppose any part of this motion.

The Deposition of Phillip Egger

Defendants seek permission to take the deposition of Phillip Egger (“Mr. Egger”), a non-party witness, on November 7, 2006, either telephonically or in person. The Court had previously ordered that Mr. Egger’s deposition be completed by October 15, 2006.

On October 11, 2006, Defendants submitted via e-mail a letter to Judge Kaplan requesting the relief sought herein, and were told, on October 13, 2006, that applications for such relief must be made by motion.

Defendants have diligently attempted to locate and depose Mr. Egger by the October 15th deadline but were ultimately unable to do so. On September 28, 2006, Defendants were finally able to track down and serve a subpoena upon Mr. Egger, who resides in the State of Washington; however, Mr. Egger’s attorney notified Defendants that Mr. Egger will be out of the country until November 7, 2006 and unavailable for a telephone interview until October 24, 2006.

The deposition of Mr. Egger, whom Defendants believe will be an essential non-party witness, is the only remaining piece of discovery in this case. Mr. Egger has already produced documents pursuant to the subpoena, which indicate that he has knowledge of the facts underlying this case which have not yet been uncovered. Defendants anticipate that this final deposition will lead to a better understanding of the facts and, possibly, to a settlement of this matter.

Therefore, Defendants respectfully request permission (which Plaintiff does not oppose) to conduct Mr. Egger’s deposition either telephonically or in person in Seattle on November 7, 2006.

The Stay

Defendants additionally seek a stay of all deadlines in this action pending the resolution of certain NFA Arbitration proceedings. Assuming Defendants are permitted to depose Mr. Egger as requested, Defendants ask that this stay be instituted immediately thereafter. Counsel for Plaintiff has indicated that he does not oppose this proposal.

The NFA arbitrations at issue are actually three related proceedings, entitled McCarthy Investments LLC v. Linuxor Asset Management, LLC, Linuxor Capital Management, LLC, Abbas A. Shah and Adam Bornstein, NFA Case No. 05-ARB-107, JFM Holdings L.P. v. Linuxor Asset Management, LLC, Linuxor Capital Management, LLC, Abbas A. Shah and Adam Bornstein, NFA Case No. 05-ARB-132, and 2001 Jane F. McCarthy Grat No. 5 v. Linuxor Asset Management, LLC, Linuxor Capital Management, LLC, Abbas A. Shah and Adam Bornstein, NFA Case No. 05-ARB-133, which will be heard by the arbitrators beginning on November 30 and December 1, 2006.¹ The parties to the NFA arbitrations expect that at least two additional dates will be required to complete the proceedings, which should be scheduled in January 2007.

Defendants respectfully submit that a stay of all proceedings in this action pending the outcome of the NFA arbitrations is the most orderly way to proceed, as the arbitrations and the case at bar involve identical facts and substantially similar legal issues. Whereas the CFTC brought suit in the action at bar seeking restitution for all of the investors and civil penalties, one investor (whose three investments comprised the vast majority of the total investment in the commodity pool) has sought recourse for the same alleged wrongdoing through the NFA arbitrations.

¹ These arbitration proceedings were brought by one individual, Philip McCarthy, who invested in the commodity pool at issue with funds from three separate entities owned and controlled by him. The NFA requires claims arising from different accounts to be brought separately.

In recent settlement discussions, the parties hereto agreed that, because the cases are similar, a resolution of the NFA proceedings would likely lead to a settlement of the case at bar. Additionally, Defendants believe that the NFA arbitrations will definitively resolve many of the key issues in this action, including disputed facts such as the authenticity of certain crucial communications, and the disputed presence of specific elements of Plaintiff's fraud claims, including justifiable reliance and damages. Once these issues are argued and decided in the arbitration proceedings, Defendants will be bound thereto, which will inevitably lead to either a settlement between the parties in this action or to a more efficient and expeditious trial.

With this in mind, Defendants respectfully submit that allowing this action to proceed simultaneously with the NFA arbitration proceedings would be impractical. Moreover, Defendants wish to avoid the considerable and potentially prohibitive expense of simultaneously defending against both the arbitrations and this action, which have already nearly depleted Defendants' limited financial resources. See Declaration of Abbas A. Shah, dated October 20, 2006, submitted herewith.

Defendants anticipate, based on scheduling discussions with the NFA Case Administrator, that the NFA hearings will be completed by the end of January 2007. The parties may then have the opportunity to submit post-trial briefs to the Panel. Pursuant to the NFA Code of Arbitration ¶ 6059.1(a), the Panel is required to issue its decision within thirty days after the record is closed. Thus, Defendants expect a decision in the NFA proceedings no later than the middle of March 2007.

In this action, the joint pretrial order filing deadline is currently scheduled for October 31, 2006. This is also the last day on which the parties may file summary judgment motions. Based on the NFA schedule, Defendants request that the parties be permitted to hold a

status conference on March 27, 2007, and that the deadline for filing the joint pretrial order and for making dispositive motions be adjourned to April 17, 2007.

Conclusion

WHEREFORE, Defendants, Abbas A. Shah and Linuxor Asset Management, LLC, respectfully request that the Court issue an Order:

- (a) permitting Defendants to depose Phillip Egger on November 7, 2006;
- (b) staying all proceedings in this action pending the resolution of the NFA arbitrations; and
- (c) for such other and further relief that this Court may deem just and equitable.

Dated: New York, New York
October 20, 2006

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